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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Annual Assessment of the Status
of Competition in the Market for
Delivery of Video Programming

CS Docket No. 95-61

**REPLY COMMENTS
OF
THE SMALL CABLE BUSINESS ASSOCIATION**

**Eric E. Breisach
Christopher C. Cinnamon
James C. Wickens**

**HOWARD & HOWARD
107 W. Michigan Ave., Suite 400
Kalamazoo, Michigan 49007**

**Attorneys for the Small Cable
Business Association**

Dated: July 28, 1995

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L INTRODUCTION

The Small Cable Business Association ("SCBA") files these Reply Comments to support and expand upon the comments of the National Cable Television Cooperative, Inc. ("NCTC") filed in this docket ("*NCTC Comments*"). SCBA and its members are keenly interested in issues raised in the *NOI*¹ concerning the pricing practices of non-vertically integrated programming providers. Many of SCBA's members are also members of NCTC. Drastic differentials in prices for programming have made such association essential to survival: favorable pricing for large MSO's significantly impacts small cable operators' ability to compete. The problem is that non-vertically integrated programming providers ignore the efficiencies of providing programming to NCTC and flatly refuse to negotiate with the Cooperative. Current Commission regulations do not protect small cable operators from these anti-competitive tactics.

SCBA is a grass-roots organization of over 340 members. More than half of them operate systems with less than 1,000 subscribers. Nearly all of SCBA's members have recently gained long-awaited rate relief in the *Eleventh Order on Reconsideration*. Still, cost pressures, particular programming cost pressures, continue to squeeze small operators. The Commission can ease this economic bind by addressing the discriminatory practices of certain non-vertically integrated programming providers.

These Reply Comments primarily focus on three critical questions posed in the *NOI*:

1. Should the program access rules be extended to non-vertically integrated program providers?²
2. Have the nondiscriminatory rate provisions (e.g., the volume discount provision) of the program access rules affected the competitive viability of small systems and

¹*Notice of Inquiry*, CS Docket No. 95-61, FCC 95-186 (released May 24, 1995) ("*NOI*").

²*NOI* at ¶ 90.

small system operators?³

3. Are there other practices of which the Commission should be aware regarding program supply?⁴

SCBA submits an emphatic yes to each question. As discussed below, continuing unjustified price discrimination by non-vertically integrated programming providers that adamantly refuse to deal with NCTC seriously impacts the operating costs of small cable operators. This consistent anti-competitive conduct by certain programming providers directly collides with the policies underlying the 1992 Cable Act. The Commission can right this continuing wrong by extending programming access rules to non-vertically integrated program providers.

In addition to the unjustified programming price discrimination described by NCTC and in these Reply Comments, SCBA seeks Commission review of the requirement that NCTC members must assume joint and several liability for the co-ops obligations. The impeccable payment record of NCTC shows that this requirement is an unnecessary burden on small cable operators, a class of businesses whose monetary obligations, even contingent ones, are already scrutinized with excruciating detail by creditors and potential creditors. The joint and several liability requirement serves no practical purpose and should cease.

³*Id.*

⁴*NOI* at ¶ 91.

II. NON-VERTICALLY INTEGRATED PROGRAM PROVIDERS CONTINUE UNJUSTIFIED PRICE DISCRIMINATION AGAINST NCTC AND SMALL CABLE OPERATORS.

A. Small cable operators still face disproportionately high programming costs.

The Commission has recognized that small cable systems and small cable companies face disproportionately higher costs than larger systems and MSO's. The Commission has made many steps toward rectifying the disproportionate burden of regulation on small operators, most recently in the *Eleventh Order on Reconsideration*. That rulemaking represents significant progress in addressing the economic and financial predicaments of smaller systems. More remains to be done, however. The unjustified price discrimination by non-vertically integrated programming providers refusing to deal with NCTC remains a serious impediment to small operators ability to compete.

Small cable operators are still faced with substantially higher programming costs for small cable businesses than larger companies. On average, larger companies (MSO's) receive discounts ranging between 97% and 10%.⁵ As detailed in supplemental comments filed with the Commission by the SCBA earlier this year, SCBA members are paying 54% more for programming than large MSOs.⁶ By way of example, an SCBA member was charged 54¢ for ESPN compared to the 42¢ charged to a large MSO. Similarly, SCBA members are charged 19¢ for The Nashville Network compared to 7¢ for a large MSO. These higher programming costs

⁵ This conclusion is supported by research performed by Paul Kagan Associates in Cable TV Programming, April 30 1992 at p. 4.

⁶ Supplemental Comments of SCBA in Further Support of Interim Benchmark Adjustments for Low Density and Small Cable Operators, dated February 15, 1994. MM Docket #92-266.

adversely impact the viability of small cable systems.

To address this problem, many SCBA members have joined NCTC. Still, many small operators remain locked out from the benefits of the economies of scale that NCTC could offer. Certain non-vertically integrated programming providers refuse to recognize and negotiate with NCTC. Consider the following documented examples of unreasonable discrimination. Both ESPN and the Nashville Network have refused to make their programming available to NCTC. Worse yet, Group W Satellite Communications has informed the Co-op that it will not renew the contract for Country Music Television ("CMT") that Group W acquired with the purchase of CMT.⁷ As further evidence of underhanded and anti-competitive conduct against NCTC, Group W attempts to justify its refusal to sell the Nashville Network to the Co-op by stating that it will not transact with NCTC because the Co-op does not have an affiliate agreement with CMT.⁸ After Group W canceled the Co-op's contract, of course it has no such agreement! This is precisely the type of anti-competitive discrimination that the 1992 Cable Act and the Commission have sought to eradicate.⁹

B. The restrictions on vertically integrated programmers have benefitted small cable operators.

The 1992 Cable Act reflects Congressional concern over small cable operators and others who were denied access to, or charged more for, programming than large cable operators. The

⁷See June 1, 1995 Group W letter, attached as exhibit 3.

⁸See June 1, 1995 Group W letter, attached as exhibit 4.

⁹ The Commission has stated that discrimination occurs when a vendor unreasonably refuses to sell "to a class of distributors." As clearly demonstrated, these discriminatory practices continue to exist and harm small cable systems and their subscribers. See *First Report and Order* at ¶ 116.

Senate Record contains testimony that small cable operators were consistently being denied access to or charged more for programming services than large vertically-integrated cable operators. In order to address the complaints of small cable operators that programmers have unreasonably discriminated against them in the sale of programming services, the 1992 Act and the Commission's rules require vertically integrated, national cable programmers to make programming available to all cable operators and their buying agents on similar price, terms and conditions.¹⁰ Congress' and the Commission's efforts in this area have benefitted small cable.

Since the passage of the 1992 Act, the NCTC has successfully entered into agreements with virtually all vertically integrated program providers on behalf of its members, many of whom are also members of the SCBA. For an example, on June 15, 1995, the NCTC entered into binding contracts with Time-Warner and Viacom to sell their programming services to the co-op. As explained in a news article:

The SCBA is extremely pleased that Time-Warner and Viacom signed binding agreements with NCTC. These companies have refused for eleven years to sell their programming to the co-op. Due to the recent agreements SCBA members will be able to obtain programming on reasonable terms and conditions for HBO, Cinemax, Show Time, The Movie Channel, Nickelodeon, MTV, and VH-1.¹¹

Before this, both Time-Warner and Viacom had refused to deal with the NCTC as a buying group for programming services. Rather, individual members were forced to purchase directly from Warner and Viacom, at substantially higher cost, or be unable to offer the top rated programming services to their subscribers. Clearly, these programmers would not have dealt with

¹⁰ 47 U.S.C. § 547; 47 C.F.R. §§ 76.1000-76.1003.

¹¹See Exhibit 1.

the NCTC and other buying groups but for the requirements imposed by the 1992 Cable Act and the Commission's rules. Unfortunately, this relief for NCTC and SCBA members remains overshadowed by continuing discrimination by non-vertically integrated programming providers.

C. The restrictions on vertically integrated programmers should be extended to non-vertically integrated programmers.

SCBA supports the comments of NCTC indicating that major program suppliers continue to refuse to make their services available to small operators on fair terms through the NCTC. The impact of this conduct is extensive. Currently, 8 of the top 25 cable programming services are non-vertically integrated.¹² By refusing to deal with NCTC, these programmers are forcing small operators and their customers to subsidize the deep discounts offered to large MSOs. From the financial standpoint of small operators and their subscribers, there is no difference between being refused access to programming, or being overcharged by a vertically or non-vertically integrated programmer.

The SCBA has urged many of these non-integrated video program providers to follow the lead of Time-Warner and Viacom by ending their unreasonable refusal to sell programming to the NCTC. Recently the SCBA sent letters to Group W, The Disney Channel, ESPN, The Arts and Entertainment Network, Lifetime, and the U.S. Network asking that they agree to sell their programming services to the co-op.¹³ The programmers refuse to respond. Consequently, SCBA members and their subscribers continue to pay higher rates for programming costs because the NCTC is unreasonably being denied the high volume discounts that large MSOs receive.

¹²MM Docket No. 92-264, April 4, 1995 at ¶ 15.

¹³See Exhibit 2.

The refusal of certain programmers to negotiate with the NCTC is unjustified and anti-competitive. The Commission has previously outlined legitimate reasons that could conceivably prevent program providers from contracting with SCBA members and buying groups. These include the possibility of: (i) parties reaching an impasse on particular terms; (ii) history of defaulting on other programming contracts; or (iii) a preference not to sell in a particular area.¹⁴ None of these legitimate reasons exist to justify the refusal of Group W and others to deal with NCTC. NCTC already assumes responsibility for billing all its members and sending one payment along with a complete report covering all systems to video program providers. There is no valid reason for concern of financial performance by the NCTC. The NCTC has never defaulted on other programming contracts. Similarly, it is impossible for the parties to have reached an impasse on a particular term since these programming providers have refused to even enter into negotiations with NCTC. Finally, since NCTC members include small cable operators nationwide, there can be no justification for the programmer's to refuse to sell based upon a particular service area. Rather, large cable operators, and other providers such as DBS, have used their market power to obtain huge programming discounts from program providers that place small cable operators at a distinct competitive disadvantage.

Regulation of programming access has worked to benefit small cable operators and their subscribers in the context of vertically integrated programming providers. The Commission will serve the fundamental principles of the 1992 Cable Act by extending restrictions on discriminatory pricing to non-vertically integrated programming providers. This will foster increased competition, expand services available to subscribers and help ensure that the costs of

¹⁴First Report and Order at ¶ 116.

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¹⁴First Report and Order at ¶ 116.

those services remain reasonable.

III. THE COMMISSION'S JOINT AND SEVERAL LIABILITY REQUIREMENT IS NO LONGER NECESSARY OR REASONABLE.

SCBA must also address here the Commission's rule that a buying group seeking unitary treatment from a programming vendor must require all individual members to agree to joint and several liability.¹⁵ NCTC's flawless payment record shows that this requirement is absurd. In its eleven-year history the NCTC has neither been late nor missed a single payment to a video programming provider. Under such circumstances, a requirement that members agree to be jointly and severally liable is unnecessary and commercially unreasonable.

The Commission's statutory authority for this provision is based upon § 628(c)(2)(b) of the 1992 Act which allows the commission to establish "reasonable requirements" for credit worthiness and financial stability. In view of the excellent financial performance of the NCTC, the continued requirement of joint and several liability is no longer a reasonable requirement. Such required guaranties impact the already difficult process many SCBA members confront when attempting to obtain financing. Many creditors, already skittish about small cable, view co-op guaranties with increased suspicion. SCBA asks that the Commission remove this requirement from its regulations and leave such contractual terms to the marketplace.

IV. CONCLUSIONS

SCBA supports NCTC's call for Commission action on the unjustified price discrimination by non-vertically integrated programming providers. The Commission should extend the prohibition of discrimination by vertically integrated programming providers to non-vertically

¹⁵47 C.F.R. § 76.1300(b)(1).

integrated programming providers. In addition, the Commission can discard the requirement of joint and several liability for members of buying groups and leave such transactional terms to the market place.

Respectfully submitted,

Howard & Howard Attorneys, P.C.

By: 

Eric E. Breisach
Christopher C. Cinnamon
James C. Wickens

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Small Cable Operators Support S. 652 And Program Access

SCBA is pleased with the passage of S. 652 by the Senate. We congratulate all those Senators who have worked so hard to craft a sensible telecommunications policy for the 21st Century, especially Senators Pressler, Hollings, Dole, Deatchle and Lott.

As among the smallest players in the telecommunications industry, small cable operators face unique concerns. We are very pleased with the Senate's acceptance of SCBA's position on rate relief for small companies. We look forward to working with the Senate and the House to adopt a comprehensive policy framework which will allow these operators to continue providing excellent service to the subscribers in their home towns.

SCBA was informed of the execution of final contracts negotiated by the National Cable Television Cooperative (NCTC) with Time-Warner and Viacom on June 15, shortly before the final vote on S. 652. Once binding contracts were signed by both Time-Warner and Viacom, SCBA believed that these major programmers could no longer deny programming to small operators and their consumers on reasonable terms and conditions.

SCBA is extremely pleased that Time-Warner and Viacom signed binding agreements with NCTC. These companies had refused for eleven years to sell their programming to the Co-op. These new agreements will enable SCBA's members to obtain programming from the following seven services on reasonable terms and conditions for the first time ever:

HBO
Cinemax
Showtime
The Movie Channel
Nickelodeon
MTV
VH-1

The more reasonable rates now agreed to by Time-Warner and Viacom will narrow the huge gap in program pricing between large and small cable operators. These contracts also eliminate the unreasonable refusal by Time-Warner and Viacom to deal with the Co-op.

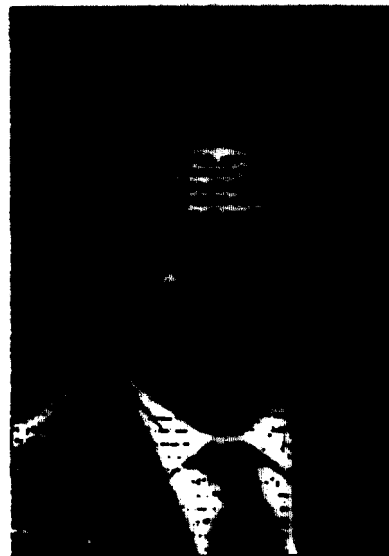
SCBA is deeply grateful to all those Senators, on both sides of the aisle, who have consistently supported program access on fair terms for small cable operators and their consumers. That support was crucial to bringing these two giant media conglomerates to the table with the Co-op.

SCBA notes, however, that there are still major program suppliers who refuse to make their services available to small operators on fair terms through NCTC. SCBA's sincere hope is that the hold outs among the "non-vertically integrated" programmers (i.e. those who do not own cable systems) will now do as most other cable programmers and sell their programming to NCTC. While not subject to the programming provisions of the 1992 Cable Act, these companies violate the spirit of that Act daily by refusing to deal with NCTC.

Group W (Nashville Network, Country Music Television)
Capital Cities/ABC (ESPN, ESPN2)
The Disney Channel
Hearst/Capital Cities/NBC (Arts and Entertainment)
Hearst/AEC (Lifetime Television)
Paramount/MCA (USA Network, Sci-Fi Channel)

Small operators and their customers should not be asked to continue subsidizing the huge discounts given by these companies to Big Cable.

SCBA calls on these companies to follow the lead of Time-Warner and Viacom and end their refusal to deal with small cable operators through the Co-op. □



David D. Kinley



Small Cable Business Association
c/o Kinley Simpson Associates
7901 Stoneridge Drive Suite 404 Fremont, CA 94538
Phone (510) 463-0404 FAX (510) 463-9627

July 12, 1995

Mr. Don Mitner
President
Group W Satellite Communications
41 Harbor Plaza Drive
Stamford, CT 06904

FAX TRANSMITTAL MEMO
TO: ERIC BREISACH
DEPT: _____ FAX #: _____
FROM: DAVID KINLEY PHONE: _____
CO: _____ FAX #: _____
Post-it brand fax transmittal memo 7671

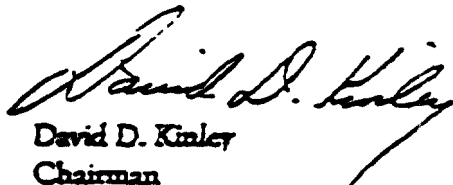
NO. OF PAGES 7

Dear Mr. Mitner:

We have been informed that your company continues to deny the programming of The Nashville Network and Country Music Television to the National Cable Television Cooperative, a program purchasing group for small cable operators. During the Senate's consideration of S. 652, both Time-Warner and Viacom decided to execute contracts with the Co-op.

In light of this, we thought you would be interested in the enclosed article about small operators' continued determination to have all program suppliers make their programming available to the Co-op. On behalf of its 370 member companies, the Small Cable Business Association calls on Group W to follow the lead of Time-Warner and Viacom by ending the unreasonable refusal to sell your programming to the Co-op.

Sincerely,


David D. Kinley
Chairman



Small Cable Business Association
c/o Kinley Shapiro Associates
7901 Stonewall Drive, Suite 404, Pittsburg, CA 94566
Phone (510) 463-0404 FAX (510) 463-9627

July 12, 1995

Mr. John F. Cooke
President
The Disney Channel
3800 W. Alameda Avenue
Burbank, CA 91505

Dear Mr. Cooke:

We have been informed that your company continues to deny the programming of The Disney Channel to the National Cable Television Cooperative, a program purchasing group for small cable operators. During the Senate's consideration of S. 652, both Time-Warner and Viacom decided to execute contracts with the Co-op.

In light of this, we thought you would be interested in the enclosed article about small operators' continued determination to have all program suppliers make their programming available to the Co-op. On behalf of its 370 member companies, the Small Cable Business Association calls on The Disney Channel to follow the lead of Time-Warner and Viacom by ending the unreasonable refusal to sell your programming to the Co-op.

Sincerely,

A handwritten signature in cursive script that reads "David D. Kinley".

David D. Kinley
Chairman



Small Cable Business Association
c/o Kinley Systems Association
7901 Serrano Drive, Suite 406, Pleasanton, CA 94588
Phone (510) 463-0404 FAX (510) 463-9627

July 12, 1995

Mr. Steven M. Bornstein
President
ESPN, Inc.
ESPN Plaza
Bristol, CT 06010

Dear Mr. Bornstein:

We have been informed that your company continues to deny the programming of ESPN and ESPN2 to the National Cable Television Cooperative, a program purchasing group for small cable operators. During the Senate's consideration of S. 652, both Time-Warner and Viacom decided to execute contracts with the Co-op.

In light of this, we thought you would be interested in the enclosed article about small operators' continued determination to have all program suppliers make their programming available to the Co-op. On behalf of its 370 member companies, the Small Cable Business Association calls on ESPN, Inc. to follow the lead of Time-Warner and Viacom by ending the unreasonable refusal to sell your programming to the Co-op.

Sincerely,

A handwritten signature in cursive script, reading "David D. Kinley".

David D. Kinley
Chairman



Small Cable Business Association

c/o Kinley Simpson Associates
7901 Stoneridge Drive Suite 404 Pleasanton, CA 94588
Phone (510) 463-0404 FAX (510) 463-9627

July 12, 1995

Mr. Nicholas Davatzes
President
Arts & Entertainment Network
235 E. 45th Street, 10th Floor
New York, NY 10017

Dear Mr. Davatzes:

We have been informed that your company continues to deny the programming of Arts & Entertainment to the National Cable Television Cooperative, a program purchasing group for small cable operators. During the Senate's consideration of S. 652, both Time-Warner and Viacom decided to execute contracts with the Co-op.

In light of this, we thought you would be interested in the enclosed article about small operators' continued determination to have all program suppliers make their programming available to the Co-op. On behalf of its 370 member companies, the Small Cable Business Association calls on the Arts & Entertainment Network to follow the lead of Time-Warner and Viacom by ending the unreasonable refusal to sell your programming to the Co-op.

Sincerely,

A handwritten signature in cursive script that reads "David D. Kinley".

David D. Kinley
Chairman



Small Cable Business Association
c/o Kinley Simpson Associates
7901 Stoneridge Drive Suite 404 Pleasanton, CA 94588
Phone (510) 463-0404 FAX (510) 463-9827

July 12, 1995

Mr. Douglas W. McCormick
President
Lifetime Entertainment Services
309 W. 49th Street, 17th Floor
New York, NY 10019

Dear Mr. McCormick:

We have been informed that your company continues to deny the programming of Lifetime to the National Cable Television Cooperative, a program purchasing group for small cable operators. During the Senate's consideration of S. 652, both Time-Warner and Viacom decided to execute contracts with the Co-op.

In light of this, we thought you would be interested in the enclosed article about small operators' continued determination to have all program suppliers make their programming available to the Co-op. On behalf of its 370 member companies, the Small Cable Business Association calls on Lifetime to follow the lead of Time-Warner and Viacom by ending the unreasonable refusal to sell your programming to the Co-op.

Sincerely,

A handwritten signature in cursive script, reading "David D. Kinley". The signature is written in dark ink and is positioned above the printed name and title.

David D. Kinley
Chairman



Small Cable Business Association

of Kinley Simpson Associates
7901 Stoneridge Drive, Suite 404, Pleasanton, CA 94588
Phone (510) 463-0404 FAX (510) 463-9827

July 12, 1995

Ms. Kay Koplovitz
President
USA Network
1230 Avenue of the Americas, 18th Floor
New York, NY 10019

Dear Ms. Koplovitz:

We have been informed that your company continues to deny the programming of USA Network to the National Cable Television Cooperative, a program purchasing group for small cable operators. During the Senate's consideration of S. 652, both Time-Warner and Viacom decided to execute contracts with the Co-op.

In light of this, we thought you would be interested in the enclosed article about small operators' continued determination to have all program suppliers make their programming available to the Co-op. On behalf of its 370 member companies, the Small Cable Business Association calls on USA Network to follow the lead of Time-Warner and Viacom by ending the unreasonable refusal to sell your programming to the Co-op.

Sincerely,

A handwritten signature in cursive script that reads "David D. Kinley".

David D. Kinley
Chairman

Officers and Executive Board Members

David D. Kinley, Chairman • Stan Scarle, Vice Chairman • Lynda J. Simpson, Secretary • Steve Friedman, Treasurer • Ellen Belisle • Ben Hooks • Tom Linder

GROUP W SATELLITE COMMUNICATIONS

Washington Broadcasting Company, Inc.
230 Parker Drive, Stamford, CT 06904-2210 (203) 945-4000

MARK MCMICK
Assistant General Counsel

June 1, 1995

VIA FAX (212-992-5903) & MAIL

Mr. Frank Hughes
Vice President
National Cable Television Cooperative, Inc.
14809 West 95th Street
Lenexa, KS 66215

Re: Country Music Television

Dear Mr. Hughes:

As requested, this will confirm in writing the statement made orally by Francis Leader of Group W to you at your May 8, 1995 meeting with Mr. Leader in Dallas. That statement was that Country Music Television, Inc. did not intend to renew the January 1, 1989 Affiliate Licensing Agreement with National Cable Television Cooperative, Inc. when that agreement expires on December 31, 1995, nor did it intend to enter into a new or replacement agreement with NCTC relating to distribution of the Country Music Television program service by or through NCTC after that date.

Very truly yours,



Mark MCMICK

cc: Michael Pundak, NCTC
Francis Leader, Group W

Group W Satellite Communications, Inc. (a subsidiary of Group W)

07/27/95

14:41

FAX 510 400 9021

JUN 02 1995

P. 05/08

JUN 02 1995 FRI 15:35

JUN 1 1995

14:29

FROM 223 363 6828

TO 819135995963

PAGE 002

GROUP W SATELLITE COMMUNICATIONSWashington Broadcasting Company, Inc.
230 West Olive Street, Stamford, CT 06904-2210 (203) 968-4000**MARK MELNICK**
Assistant General Counsel

June 1, 1995

VIA FAX (913-599-5903) & MAILMr. Frank Hughes
Vice President
National Cable Television Cooperative, Inc.
14809 West 95th Street
Lenexa, KS 66215Re: Group W Discount Programs

Dear Mr. Hughes:

This is in response to a request you made to Francis Leader of Group W in your May 26, 1995 telephone conversation with Ms. Leader. Your request was for Group W to reiterate the qualifications of Group W's standard U.S. cable industry The Nashville Network and Country Music Television affiliate-wide cross-discount program that NCTC does not satisfy. You told Ms. Leader in that conversation that you needed those qualifications reiterated to assist you in understanding why Group W offered NCTC its alternate standard U.S. cable industry discount program, which operates on a system-by-system basis and, overall, has fewer discount benefits.*

The qualifications of Group W's affiliate-wide discount program that NCTC does not satisfy include the following:

1. NCTC does not have an executed, written affiliate agreement for distribution of INN entered into with Group W on behalf of the owner of INN.
2. NCTC does not have an executed, written affiliate agreement for distribution of CMT entered into with Group W on behalf of the owner of CMT.
3. NCTC does not have CMT license fees, from which the CMT discounts of the affiliate-wide program would apply, equal to Group W's standard rate card rates for CMT.

* As you know, the system-by-system discount offer was made to NCTC in Francis Leader's December 6, 1994 letter to NCTC's President, Michael Pandak. NCTC has yet to accept that offer.

